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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164764
Party	Defendant The Brinkmann Corporation The Brinkmann Corporation 4215 McEwen Road Dallas, TX 75244
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Brink's Network, Incorporated,)	
)	Opposition No. 91164764
Opposer,)	
)	Serial No. 76/483,115
v.)	
)	Filed: January 17, 2003
The Brinkmann Corporation,)	
)	Mark: BRINKMANN
Applicant.)	
)	Published: October 5, 2004

APPLICANT'S OPPOSITION TO OPPOSER'S
MOTION TO COMPEL DISCOVERY

I.

INTRODUCTION

Opposer, Brink's Network, Inc., has moved to compel Applicant, The Brinkmann Corporation, to produce documents responsive to Opposer's First Request for Production of Documents and Things, to produce a witness in response in Opposer's Notice of Taking Discovery Deposition, and to respond to Opposer's draft Protective Order. Opposer has also requested that the Board stay proceedings pending disposition of its motion, and to reset discovery and testimony periods.

Pursuant to 37 C.F.R. § 2.127(a), Brinkmann responds by asking the Trademark Trial and Appeal Board to deny Opposer's requests to compel document production, produce a deposition witness, and provide protective order comments. The relief sought by Opposer is unnecessary and unwarranted. Brinkmann has produced non-privileged documents responsive to

Opposer's First Request for Production of Documents and Things. Brinkmann has advised Opposer that, subject to the Board's stay of this proceeding, its designated witness is available for deposition in January 2006. And, Brinkmann has provided its proposed revisions to Opposer's draft Protective Order and is waiting to hear back from Opposer. Accordingly, Brinkmann requests that the Board deny the relief requested by Opposer.

Brinkmann joins Opposer's request to stay proceedings pending disposition of its Motion to Compel, and to reset the discovery and testimony periods.

II.

FACTUAL BACKGROUND

Applicant Brinkmann is a consumer products company based in Dallas, Texas. It has used its house mark BRINKMANN—which is the surname of the company's founder, J. Baxter Brinkmann—on a variety of merchandise since the 1970s. On January 17, 2003, Brinkmann filed its trademark application, U.S. Application Serial No. 76/483,115, for its mark BRINKMANN in multiple classes to cover its then-existing lines of goods. The application was published for opposition on October 5, 2004. Opposer Brink's Network filed a Notice of Opposition on April 1, 2005. The discovery period closed on December 21, 2005.

Opposer served a First Request for Production of Documents and Things on September 6, 2005 via first class mail. Applicant timely served its Response on October 11, 2005. Applicant has now sent non-confidential production documents and certain redacted confidential production documents to Opposer by overnight mail on December 28, 2005, labeled BM 000001 – BM 001706. Production of unredacted copies and any other confidential documents that Brinkmann has not objected to producing must await resolution and entry of a Protective Order.

Opposer served a Notice of Taking Discovery Deposition of Applicant pursuant to FED. R. CIV. P. 30(b)(6) on September 19, 2005. Opposer unilaterally scheduled the deposition for November 19, 2005, without checking availability of Brinkmann or its counsel.

In a telephone conference on October 7, 2005, counsel for Brinkmann advised counsel for Opposer that Brinkmann's designated witness, Brinkmann's Executive Vice President, could not attend the deposition due to scheduling conflicts. Counsel for Brinkmann explained that Brinkmann was gearing up for the 2005 holiday season and that Brinkmann's Executive Vice President was constantly traveling to the People's Republic of China on business, making it difficult to confirm his availability for deposition dates. Brinkmann subsequently served its Response to Opposer's Notice of Taking Deposition on October 12, 2005.

Brinkmann's Executive Vice President has recently left Brinkmann's employ, but Brinkmann has now identified another knowledgeable witness to designate for Opposer's discovery deposition. Brinkmann's designated witness is generally available for deposition in January 2006, and Opposer's counsel has been so notified via e-mail.

Opposer sent a draft Protective Order to Brinkmann on October 19, 2005. For reasons unexplained by Opposer, the draft Protective Order contained certain revisions to the standard Trademark Trial and Appeal Board protective order that were unacceptable to Brinkmann. Brinkmann has provided Opposer with Brinkmann's proposed revisions to the draft Protective Order via e-mail on December 23, 2005.

III.
DISCUSSION

A. **Brinkmann Has Produced Documents Responsive to Opposer's First Request for Production of Documents**

Opposer has requested non-privileged documents responsive to its First Request for Production of Documents and Things. As discussed, Brinkmann sent responsive non-confidential documents and certain redacted confidential documents to Opposer via overnight mail on December 28, 2005. Production of unredacted copies and any other confidential documents must await resolution and entry of the Protective Order. For the time being, Brinkmann's production of non-confidential documents renders Opposer's motion moot. Accordingly, Opposer's motion on this issue should be denied.

B. **Brinkmann's Designated Witness for Opposer's Discovery Deposition is Available in January 2006 or Any Other Month that Opposer Prefers**

Opposer has requested that "[w]ithin two weeks following the Board's Order granting this motion, Applicant [] provide notice of at least two proposed dates for the deposition of Applicant's Rule 30(b)(6) witness. The two proposed dates shall be within a four-week period following said notification. The date selected for the deposition of Applicant's Rule 30(b)(6) witness must be mutually agreeable to Opposer and Applicant[.]" (Motion at ¶ 8.)

Brinkmann has notified Opposer that its new designated witness is generally available in January 2006, subject to the Board's stay of the proceeding and, providing reasonable advance notice and accommodation of schedules of counsel and travel considerations. For this reason, Opposer's motion on this issue is moot and should be denied as well.

C. **Brinkmann Has Provided Its Proposed Revisions to Opposer's Draft Protective Order**

Opposer states that its draft Protective Order is “in form and substance essentially a standard type of Protective Order oriented to *inter partes* registration proceedings before the Board.” (Memorandum in Support of Motion at p. 6.) However, to the contrary, Opposer’s draft Protective Order contained key changes to the Board’s standard order which changed the scope and level of confidentiality. In particular, the Board’s standard Protective Order makes it clear that only outside counsel may have access to information designated as “trade secret/commercially sensitive.” In contrast, Opposer’s draft Protective Order would allow an in-house attorney for Opposer to have access to Brinkmann’s “trade secret/commercially sensitive” information, without any limitations on the in-house attorney’s involvement in business decisions for Opposer. In addition, the Board’s standard Protective Order requires parties that propose to share the other party’s protected information with any experts or consultants notify the other party about the proposed disclosure. In contrast, Opposer’s draft Protective Order would require notification only if a party proposed to share protected information with a “testifying” expert. This would conceivably mean that a party’s trade secret/commercially sensitive information could be disseminated to an unlimited number of individuals, without that party’s knowledge or consent.

Brinkmann provided a revised draft Protective Order along with a redline showing its proposed changes via e-mail on December 23, 2005. Brinkmann is now awaiting Opposer’s comments to the revised Protective Order. Therefore Opposer’s motion on this issue is moot and should be denied.

IV.

CONCLUSION

For all the reasons stated herein, Defendant respectfully requests that the Court deny Opposer's motion to compel Brinkmann to produce documents responsive to Opposer's First Request for Production of Documents and Things, to produce a witness in response in Opposer's Notice of Taking Discovery Deposition, and to respond to Opposer's draft Protective Order. Brinkmann joins Opposer's request to stay proceedings pending disposition of its Motion to Compel, and to reset the discovery and testimony periods.

December 28, 2005

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: _____



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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing APPLICANT'S
OPPOSITION TO OPPOSER'S MOTION TO COMPEL DISCOVERY upon Alan S. Cooper,
counsel for Opposer, at Howrey Simon Arnold & White LLP, 1299 Pennsylvania Ave., N.W.,
Washington, D.C. 20004, via first class mail, postage prepaid, on December 28, 2005.

By _____


SUSAN HWANG